No. 87-1346

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In The

Supreme Court of the United States

October Term, 1987

BONITO BOATS, INC.

Petitioner,

v.

THUNDER CRAFT BOATS, INC.

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

REPLY BRIEF FOR THE PETITIONER

TOMAS MORGAN RUSSELL*
DAVID B. GOROFF
HOPKINS & SUTTER
Three First National Plaza
Suite 4200
Chicago, Illinois 60602
(312) 558-6600

GRANGER COOK, JR.
COOK, WETZEL & EGAN, LTD.
135 South LaSalle Street
Suite 4100
Chicago, Illinois 60603
(312) 236-8500

JOHN S. SCHOENE
SCHOENE & BYRD
901 North Mills Avenue
Orlando, Florida 32853
(407) 896-9471

Counsel for Petitioner

*Counsel of Record

October 28, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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INTRODUCTION

Federal patent law and state unfair competition law developed together as two means for encouraging a richer, fairer marketplace. For over a century, this Court has recognized that both laws can function in harmony. This is true even when a state statute results in a restraint on a patented article.

Substantial precedent exists for upholding state police power bans and restrictions on both patented and unpatented articles and processes. Of course, the states may not encroach on rights constitutionally granted to the federal government. Hence, state laws that conferred patent-like rights for an unpatented article – the plenary right to exclude others from making, using or selling the article – were found unconstitutional in *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) and *Compco Corp. v. Day Brite Lighting, Inc.*, 376 U.S. 234 (1964) ("*Sears-Compco*"). But so long as a state statute does not "clash" with the objectives of the patent laws or confer the equivalent of patent rights, it is constitutional. Under the test set forth in *Kewanee Oil Corp. v. Bicron Corp.*, 416 U.S. 470 (1974) ("*Kewanee*"), this Court must make this determination by comparing the objectives and effects of the state law and the federal patent law.

Florida, like eleven other states, has determined that direct molding of vessel parts constitutes a threat to fair competition in a vital state industry and has prohibited the practice. As Thunder Craft correctly notes, the effect of the law is to prohibit use of the direct molding process in manufacturing that one class of article. But such a restraint does not offend the objectives and effects of the

patent laws. Numerous other lawful means of copying remain available for vessel parts and the unpatented vessel parts themselves remain in the public domain. Indeed, anti-direct molding laws do not offend the spirit of *Sears-Compco* – and this is one reason why twelve states have found such legislation to be within traditional state authority (Pet. App. 1-12) and why the Federal Circuit has held that such a statute is constitutional.

I. Florida's Anti-Direct Molding Statute Represents a Valid Exercise of State Police Power.

In passing its law, the Florida legislature was acting within the realm of traditional state authority to regulate unfair competition recognized as constitutional by this Court. The Florida legislature saw the law as necessary to curb a threat to the survival of its recreational boating industry.

A State Senator explained the purpose of and need for the law:

> This bill addresses two problems . . . Two, deals with hull duplication . . . [F]or instance Macko [a Florida manufacturer] would design an energy efficient hull, and would spend several months or years in research and its design, but once they market that boat anybody can pull it down to one of these industrial sections where they have a little shop and what they refer to in boat manufacturing as splashing, duplicate that hull and start manufacturing that same hull. So, first of all, there is no inducement for that quality boat manufacturer to improve these designs and secondly, if he does, it is immediately copied. This would prevent that and allow him recourse in circuit court. (J.A. at 21-22).

II. Exercises of State Police Power Have Coexisted in Harmony With the Patent Law

That similar goals underlie both state regulation of unfair trade practices and federal intellectual property law is one reason this Court has repeatedly held that such state law can exist in harmony with federal patent law. *See, e.g., Kewanee,* and *Aronson v. Quick Point Pencil Co.,* 440 U.S. 257, 262 (1979) (*"Aronson"*).

Thunder Craft correctly notes that the Florida legislature determined that the use of the direct molding process, as applied to vessel parts, is a form of unfair competition and prohibited only that process for commercially reproducing such parts. (Resp. Br. at 15) Moreover, Thunder Craft correctly notes that the Florida statute allows the original manufacturer a "narrow" right to limit competitiors from using that one process for copying its boat hulls for commercial use. (Id.) From there, however, Thunder Craft falters on the fallacious assumption that any state restriction of the use or sale of an unpatented process necessarily offends the federal patent laws.

A. This Court has held that states may prohibit the use, manufacture and sale of patented articles and processes

Over a century ago, in *Patterson v. Kentucky,* 97 U.S. 501 (1879), this Court considered the validity of a Kentucky statute imposing a penalty upon any one selling or offering for sale oils which would burn below 130° F. Patterson was fined for selling oil which failed the standard, but for which she held a patent. Patterson disputed the validity of the statute as interfering with her patent rights. In upholding the state law, this Court held:

> We are of opinion that the right conferred upon the patentee and his assigns to use and vend the corporeal thing or article, brought into existence by the application of the patented discovery, must be exercised in subordination to the police regulations which the State established by the statute of 1874. It is not to be supposed that Congress intended to authorize or regulate the sale, within a State, of tangible personal property which that State declares to be unfit and unsafe for use, and by statute has prohibited from being sold or offered for sale within its limits. *Id.* at 505.

The statute did not infringe patent rights, this Court held, because:

> [The right which the patents] primarily secure is the exclusive right in the discovery. . . . [B]ut the use of the tangible property which comes into existence by the application of the discovery is not beyond the control of State legislation, simply because the patentee acquires a monopoly in his discovery. *Id.* at 506-507.

To illustrate, this Court quoted approvingly from the Court of Appeals and Errors of Delaware in *Vanini v. Paine*, 1 Harr. 65 (Del. 1833):

> It therefore cannot be admitted that the plaintiffs have a right to use an invention for drawing lotteries in this State, merely because they have a patent for it under the United States. A person might with as much propriety claim a right to commit murder with an instrument, because he held a patent for it as a new and useful invention. *Id.* at 508.

Again, in *Webber v. Virginia*, 103 U.S. 344 (1881), this Court, in holding that patents do not exclude the tangible property in which the invention is embodied from the tax or license laws of a state, said:

> And the right conferred by the patent laws of the United States to inventors to sell their inventions and discoveries does not take the tangible property, in which the invention or discovery may be exhibited or carried into effect, from the operation of the tax and license laws of the State. *Id.* at 347.

The *Webber* Court provided additional illustration of the extent of state authority to regulate patented articles:

> The patent for a dynamite powder does not prevent the State from prescribing the conditions of manufacture, storage, and sale, so as to protect the community from the danger of explosion. A patent for the manufacture and sale of a deadly poison does not lessen the right of the State to control its handling and use. The legislation respecting the articles which the State may adopt after the patents have expired, it may equally adopt during their continuance. It is only the right to the invention or discovery – the incorporeal right – which the State cannot interfere with. Congress never intended that the patent laws should displace the police powers of the States, meaning by that term those powers by which the health, good order, peace, and general welfare of the community are promoted. Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the State over all property within its limits. *Id.* at 347-48.

Numerous other cases have reaffirmed the principles of *Patterson* and *Webber*.[1]

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[1] *See Carbice Corp. v. American Patents Development Corp.*, 283 U.S. 27, 32-33 n. 3 (1931) ("Nor does the grant of a United States patent exempt the patented product from the limitations imposed by state police statutes"); *Pierce Oil Corp. v. City of*

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The essence of patent protection is the *"right to exclude others* from making, using or selling the invention . . . " 35 U.S.C. § 154 (emphasis added). *The patent laws do not give one an affirmative right to practice his invention or sell articles produced according to the patent. See, e.g., Patterson v. Kentucky*, 97 U.S. at 506-507. Thus, radar detectors, fireworks, and slot machines are all articles which may be the subject of patent. Nonetheless, state and local governmental bans on the use or sale of these articles do not offend the Constitution, even where such bans entirely withdraw the patented article from the public domain. *See, e.g., Electrolert Corp. v. Barry*, 737 F.2d 110 (D.C. Cir. 1984) (upholding ban on radar detectors); *Consigned Sales Company v. Sanders*, 543 F. Supp. 230 (W.D. Okla. 1982) (upholding ban on fireworks). Local building, electrical and fire codes routinely restrict the use of patentable articles such as plastic pipes, formaldehyde insulation, or asbestos fireproofing. Other patentable articles which are the subject of state regulation include firearms, ammunition, alchoholic beverages, medical devices, and animal traps – and the list can go on *ad infinitum*. Clearly, patented articles are not immunized from the exercise of state police powers.

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Hope, 248 U.S. 498, 499 (1919); *Ozan Lumber v. Union County Bank*, 207 U.S. 251 (1907); *Allen v. Riley*, 203 U.S. 347, 355 (1906); *John Woods & Sons v. Carl*, 203 U.S. 358, 359 (1906); *see also Decker v. Federal Trade Commission*, 176 F.2d 461, 464 (D.C. Cir.), *cert. denied*, 338 U.S. 878 (1949). *Cf. Standard Sanitary Manufacturing Co. v. United States*, 226 U.S. 20, 49 (1912) (patent-holder) is subject to federal antitrust laws because "[r]ights conferred by patent are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions.")

B. This Court has held that states may prohibit the use, manufacture, and sale of unpatented articles and processes

Just as a state may prohibit the use and sale of articles that are protected by a patent, so it may restrict the use and sale of articles or processes that do not qualify for a patent.

Thus, this Court has upheld trade secrecy laws that protect unpatented articles and processes as compatible with federal patent law. *Kewanee*. In *E. I. Du Pont de Nemours & Co. v. Christopher*, 431 F.2d 1012 (5th Cir. 1970), *cert. denied*, 400 U.S. 1024 (1971), the Fifth Circuit upheld the application of the Texas trade secrecy law against a party that discovered his competitor's secret processes through the use of aerial photography. The court stated that "[t]o obtain knowledge of a process without spending the time and money to discover it independently is *improper* unless the holder voluntarily discloses it or fails to take reasonable precautions to ensure its secrecy." *Id.* at 1015-16 (emphasis in original).

Anti-direct molding laws are less restrictive of public access to unpatented articles and processes than are trade secrecy laws. The distinction offered by Thunder Craft that trade secrecy laws pass constitutional muster only because they apply to matter not already in the public domain misreads *Kewanee* and is logically untenable. As a key purpose of the patent laws is to encourage the disclosure of information to the public, a law that assists in keeping processes from the public *in perpetuity* would seem to contravene patent policy more than the Florida anti-direct molding law which merely restricts the use of

only one process in the commercial manufacture of only one type of article.

Moreover, this Court has upheld state restrictions on the use of creations unprotected by federal law even after they have passed into the public domain. Thus, a contractual restraint on the use of an unpatented keyholder was held constitutional in *Aronson*, even after the keyholder had passed into the public domain. 440 U.S. at 263.[2]

Clearly, unpatented articles are not immunized from the exercise of state police power.

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[2] Similarly, under the former Copyright Act, record piracy statutes were upheld in *Goldstein v. California*, 412 U.S. 546 (1973) (*"Goldstein"*) even as to performances which had been made public. Again, in *Grove Press Inc. v. Collectors Publication, Inc.*, 264 F. Supp. 603 (C.D. Cal. 1967), the court applied California's unfair competition statute against the appropriation of a literary work in the public domain through the use of an offset lithography process which involved photographing the pages of plaintiff's uncopyrightable book and using the photographs in compiling defendant's book. The court explained:

> Defendants first edition is more than mere copying of Plaintiff's work, the Grove edition. In view of Plaintiff's expenditure of substantial sums in setting type and engraving plates, it would constitute unfair competition for Defendants to appropriate the value and benefit of such expenditure to themselves by photographing and reproducing Plaintiff's book through the offset-lithography process, thereby cutting their own costs and obtaining an unfair competitive advantage. *Id.* at 606-607.

III. State Law is Only Preempted When It "Clashes" with Federal Patent Law

There is a presumption the "Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Congress has not stated, as Thunder Craft asserts without citation to authority, that states may not in any manner regulate the use or sale of unpatented articles and processes. If such were the case, there could be no state law of unfair competition. Second, as discussed *supra* at pages 3 to 8, states may restrict or ban the public's access to specific articles or processes when these are deemed injurious to competition or the public good. Instead, what the Constitution requires is that states, under the guise of their unfair competition laws, cannot pass legislation that "clashes" with the objectives and effects of the federal patent laws. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984).

A. Anti-direct molding statutes do no "clash" with the objectives and effects of federal patent statutes

By restricting a practice that places original manufacturers at a disadvantage against their commercial competitors and thus defeats the incentive to create new products, anti-direct molding laws, like the patent laws, foster creation. In addition, unlike the patent laws, but consistent with their objectives, anti-direct molding laws also ensure that competition in articles once placed in the public domain remains fair. *Nothing in the patent statutes or case law states that unpatented articles must be free to be copied in any manner whatsoever.*

Anti-direct molding laws do not discourage anyone from seeking patent protection for articles that qualify for such rights. The only way for a manufacturer of vessel parts to secure the right to exclude others from making, using or selling such parts is through a patent. Thunder Craft tries to obfuscate this fact by arguing that anti-direct molding laws accord patent protection by granting original manufacturers exclusive rights to use the direct molding process with regard to their vessel parts. However, under Florida's law, the direct molding process may even be used for copying vessel parts when copies are produced for research, testing or personal use rather than for sale.

Nor does the fact that an unfair competition law bars a practice *in perpetuity* offend the patent laws. As this Court noted in upholding the record piracy law in *Goldstein*, "Although the protection afforded to each master recording is substantial, lasting for an unlimited time, the scope of the proscribed activities is narrow. No limitation is placed on the use of the music, lyrics, or arrangement employed in making the master recording." 412 U.S. at 550. Similarly, here, only the direct molding process for copying vessel parts is barred for an unlimited time. Numerous other lawful means of copying the vessel parts remain freely available.

Thunder Craft misstates federal law by claiming, without citation to case law or statute, that Congress has dictated that the "best mode" of copying an unpatented article remain beyond state regulation. Thunder Craft's argument is based on the *non sequitur* that because patent law requires a disclosure of the inventor's best mode of

practicing the invention *as a condition for receiving a patent*, the law requires that states not ban the best mode of making an unpatented article or using an unpatented process. However, the patent laws only require that an inventor disclose "the best mode comtemplated by *the inventor* of carrying out *his invention*," as a *quid pro quo* for obtaining the extensive parcel of rights concomitant to a patent – the right to exclude others from making, using or selling *his invention*. 35 U.S.C. § 112.

Section 112 is merely a disclosure provision. With an unpatented article or process the state – here Florida – is not granting the manufacturer any of the extensive rights enjoyed by a patent holder. *Most importantly, neither statutory nor case law requires that once a process is disclosed to the public it may not be regulated by the state. Nothing for example, prevents a state from barring the practice in its jurisdiction of the "best mode" for manufacturing fireworks or the "best mode" for distilling liquor.*

Thunder Craft admits that certain practices may be "commercially reprehensible" such as passing off, breach of contract, or unprivileged imitation of nonfunctional trade dress product configuration which has acquired a secondary meaning. (Resp. Br. at 22). Thus, Thunder Craft recognizes that these practices are the subject of legitimate state regulation even though they may lead to "manufacturing efficiencies and lower prices." (*Id.* at 18) For instance, the least expensive and most efficient way to produce a cola competitive with Coca-Cola might well be to steal the secret formula or bribe someone to reveal it. Apart from its desire to substitute its judgment for that of the Florida legislature, then, Thunder Craft cannot explain why the direct molding process cannot similarly

be deemed to be "commercially reprehensible conduct," as Florida did in passing its anti-direct molding statute.

B. Anti-direct molding statutes do not confer the practical equivalent of patent protection

Florida's anti-direct-molding statute does not confer the equivalent of patent rights. Thunder Craft states that "[p]rior to enactment of the Florida Statute, a competitior lawfully acquiring access to unpatented boat could lawfully copy it in every detail." (Resp. Br. at 16). *This remains true after the passage of the Florida anti-direct molding law.* Manufactures gain no right to exclude others from making, using or selling vessel parts. The unpatented vessel parts remain in the public domain, free for all to copy by numerous legal means, such as reverse engineering.[3] The withdrawal of one method of copying only one class of unpatented article that the legislature has determined to be a threat to competition in an important industry offers manufacturers what Thunder Craft admits is merely a "narrow" right (*Id.* at 15) and does not result in the total exclusion of an unpatented process or article from the public domain, as did the statutes found wanting in *Sears-Compco*.

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[3] Thunder Craft erroneously claims that the direct molding process is a form of reverse engineering (Resp. Br. at 20) but direct molding does not involve those processes identified by this Court in defining reverse engineering in *Kewanee*, "that is, by starting with a known product and working backward to divine the process which aided in its developement or manufacture." 416 U.S. at 476.

C. Anti-direct molding statutes are readily distinguishable from those found wanting in *Sears-Compco*

Anti-direct molding laws are narrow in scope and do not conflict with the purposes of the patent law or confer the equivalent of patent protection, as did the state law in *Sears-Compco*. This is why the Federal Circuit found constitutional a statute nearly identical to Florida's in *Interpart v. Italia*, 777 F.2d 678, 684-86 (Fed. Cir. 1985).[4] *See also Gladstone v. Hillel*, 203 Cal. App. 3d 977, 250 Cal. Rptr. 372 (1st Dist. 1988) (citing *Interpart* with approval).

IV. Anti-Direct Molding Statutes are not Preempted by the Copyright Act

The Amicus Brief of the Certified Automobile Parts Association ("CAPA") argues at length that the design of a boat hull is "sculptural work" under 17 U.S.C. § 102 of the Federal Copyright Act and thus is preempted "subject matter of copyright" under 17 U.S.C. § 301. CAPA's argument is based on a misconstruction of the Florida statute, and a misinterpretation of the provisions of the copyright law.[5]

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[4] Thunder Craft's effort to ascribe significance to the phrase "absent an existing patent right" ignores that text of *Interpart*. That phrase followed the Federal Circuit's lengthy explanation of why the California plug molding statute did not give the creator of the product patent rights and why the state law did not clash with federal patent law. The reference in question, if intended to have any meaning, clearly referred to facts not at issue with the California's plug molding statute and not present here.

[5] The question of whether the Florida statute is preempted by the Federal Copyright Act is not properly before this Court.

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First, the preemption Section 301 of the Federal Copyright Act does not apply because the Florida anti-direct molding statute prohibits only the use of a single unfair manufacturing *process*. Specifically, the Copyright Act's preemption provision, Section 301, is expressly limited to works which "come within the subject matter of copyright as specified by sections 102 and 103 . . . " A process, however, is specifically *excluded* by Section 102(b).[6] Therefore, for this most fundamental reason, which is wholly ignored by CAPA, the Florida anti-direct molding statute is not preempted by Section 301.

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Supreme Court Rule 21.1(a) provides, in part: "Only questions set forth in the petition or fairly included therein will be considered by the Court." The Petition here only raises the question of preemption under Patent Law. Further, no Florida Court considered the effect of the Copyright Act on the statute in question. This Court has indicated that it "ordinarily will not decide questions not raised or litigated in the lower courts," *City of Springfield v. Kibbe*, 480 U.S. 257, 107 S.Ct. 1114, 1115 (1987), especially when determining the constitutionality of a state statute because "in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality." *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). However, Bonito addresses the issue of preemption by the Copyright Act in the event that this Court determines this issue to be "fairly included" for its consideration.

[6] "In no case does copyright protection from the original work of authorship extend to any idea, procedure, *process*, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b) (emphasis added).

Second, the preemption Section 301 also does not apply because vessel hulls and component parts are not within the "subject matter of copyright" under Section 102. The premise of CAPA's argument – that vessel hulls and component parts are "sculptural works" and therefore "subject matter of copyright" to which Section 301 applies – is contrary to the clear language of Sections 101 and 102 of the Copyright Act. Section 102 extends copyright protection, *inter alia*, to "pictorial, graphic, and sculptural works". 17 U.S.C. § 102(5). Section 101 defines "pictorial, graphic and sculptural works" and states, *inter alia*:

> *[T]he design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.* (Emphasis added) 17 U.S.C. § 101.[7]

Vessel hulls and component parts are clearly "useful articles" as defined in Section 101. Accordingly, under the Copyright Act, vessel hulls are "pictorial graphic and sculptural works", and thus are the "subject matter of copyright" preempted by Section 301, only if and to the extent that the aesthetic features can be identified

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[7] "Useful article" is separately defined in Section 101 as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article'." 17 U.S.C. § 101.

separately from, and are capable of existing independently of, the utilitarian aspects of the article.[8]

The legislative history makes clear that the intent of Congress was to exclude from the "subject matter of copyright" designs of industrial products, such as vessel hulls having both separate and independent aesthetic features:

> *[A]lthough the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill. Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill.* The test of separability and independence from "the utilitarian aspects of the article" does not depend upon the nature of the design – that is, even if the appearance of an article is determined by aesthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable. And, even if the three-dimensional design contains some such element (for example, a carving on the back of a chair or a floral relief design on silver flatware), copyright protection would extend only to that element, and *would not cover the*

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[8] CAPA argues that whether the aesthetic features of a vessel hull can be "identified separately from . . ." is merely a condition of registration and not a requirement for a "subject matter of copyright" under Section 102 and 301. As demonstrated above, this argument simply has no basis in the statute, and CAPA cites no case law holding otherwise. Indeed there

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> *over-all configuration of the utilitarian article as such.* (Emphasis added) H. Rep. No. 1476 on Senate Bill No. 22, 94th Cong., 2d Sess. 55 (1976).

The shape of a vessel hull is clearly of the same character as that of an automobile or airplane and, thus is not within the "subject matter of copyright" defined by Sections 101 and 102, and preempted under Section 301.[9]

CAPA's reliance on pictures of nineteenth century sailing ships with figureheads, Viking ships, etc., for the apparent purpose of creating an issue as to whether component parts of vessels may be subject to copyright protection, is unconvincing. The present case solely concerns the hull design of a recreational boat. There is no evidence that anyone has ever sought to employ the anti-direct molding statute to limit plug molding of a figurehead for a ship, that any court of Florida has ever interpreted the statute to include such articles, or that a

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are numerous cases to the contrary. *See, e.g., Fabrica, Inc. v. El Dorado Corp.*, 697 F.2d 890 (9th Cir. 1983); *Carol Barnhart, Inc. v. Economy Cover Corp.*, 773 F.2d 411 (2nd Cir. 1985) and *Williams Electronics, Inc. v. Bally Manufacturing Corp.*, 568 F. Supp. 1274 (N.D.Ill. 1983).

[9] The conclusion that vessel hulls are not "subject matter of copyright" is further compelled by the fact that the original Senate bill included a section specifically providing protection for industrial designs, such as vessel hulls. S. Rep. No. 473, 94th Cong., 1st Sess. 161-162 (1975). This section, however, was rejected by the House of Representatives which opposed extension of copyright protection to industrial designs, H. Rep. No. 1476, *supra* at 82, and the Senate accepted deletion of that section. Conf. Rep. No. 1733, 94th Cong., 2d Sess. 82 (1976).

Florida court would construe the Florida statute in a manner inconsistent with the copyright laws. In any event, these references are *dehors* the record before this Court, and for that additional reason should not be considered.

Third, the preemption Section 301 does not apply because the anti-direct molding statute does not create a right "equivalent to any of the exclusive rights . . . specified by Section 106" of the Copyright Act. 17 U.S.C. § 301(a). Section 301(b) provides that:

> Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to–
>
> . . .
>
> (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

Accordingly, to assess the preemptive effect of Section 301, a comparison is required between the *exclusive* rights granted in Section 106 of the Copyright Act and the right granted under the anti-direct molding statute. In pertinent part, Section 106 grants the copyright owner the *exclusive* right, i.e., to the exclusion of others, to reproduce, distribute and display the copyrighted work, 17 U.S.C. § 106(1), (3), and (5).

By contrast the anti-direct molding statute creates no such *exclusive* rights. As previously stated, the anti-direct molding statute prohibits only a single limited method of duplication, leaving available all other conceivable means for reproducing vessel hulls and component parts. In addition, the right provided by the anti-direct molding

statute is not exclusive in the original manufacturer or owner. Any person who suffers injury or damage may bring an action under the statute. This may include, for example, a purchaser or distributor, in addition to the original manufacturer. *See Gladstone v. Hillel*, 203 Cal. App. 3d 977, 250 Cal. Rptr. 372 (1st Dist. 1988).

Accordingly, the rights created by the statute cannot rationally be considered equivalent to the exclusive rights in copyrights works granted in Section 106 and, thus, are not subject preemption under Section 301(b)(3) of the Copyright Act.

CONCLUSION

The decision of the Florida Supreme Court should be reversed and this case remanded for further proceedings.

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Respectfully submitted,

TOMAS MORGAN RUSSELL*
DAVID B. GOROFF
HOPKINS & SUTTER
Three First National Plaza
Suite 4200
Chicago, Illinois 60602
(312) 558-6600

GRANGER COOK, JR.
COOK, WETZEL & EGAN, LTD.
135 South LaSalle Street
Suite 4100
Chicago, Illinois 60603
(312) 236-8500

JOHN S. SCHOENE
SCHOENE & BYRD
901 North Mills Avenue
Orlando, Florida 32853
(407) 896-9471

Counsel for Petitioner

*Counsel of Record